

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

REPLY COMMENTS OF THE CITY OF SAN JOSE, CALIFORNIA

Richard Doyle, City Attorney
Jennifer Pousho, Deputy City Attorney
City of San José
200 East Santa Clara Street
16th Floor
San José, California 95113
Tel: (408) 535-1900
Fax: (408) 998-3131
Richard.Doyle@sanjoseca.gov
Jennifer.Pouso@sanjoseca.gov

September 30, 2011

TABLE OF CONTENTS

	Page
SUMMARY	II
REPLY COMMENTS OF THE CITY OF SAN JOSE, CALIFORNIA	1
I. THE CITY HAS FACILITATED, NOT DELAYED BROADBAND DEPLOYMENT	2
II. PCIA IS WRONG ABOUT THE CITY'S COLLOCATION REVIEW PROCESS	4
III. NEXTG'S CLAIMS THAT SAN JOSE IS HINDERING WIRELESS AND DAS INSTALLATIONS THROUGH EXCESSIVE CHARGES ARE WRONG AND MISSTATE THE FACTS AND THE APPLICABLE LAW	8
A. San José Has Spent Millions Of Dollars Implementing Its Utilities Undergrounding Program Since 1968 Motivated By A Desire To Improve Its Community, Not To Gain Revenues For Use Of Its Streetlights	9
B. Nextg's Criticisms Of The City's Rental Charges Misstate The Facts And The Law	12
IV. THE CITY SUPPORTS THE NATIONAL LOCAL GOVERNMENT ASSOCIATIONS' COMMENTS OPPOSING FEDERAL REGULATION OF LOCAL RIGHTS OF WAY AND WIRELESS SITING.....	16
CONCLUSION.....	17

ATTACHMENT LIST

1. COUNCIL POLICY 6-20
2. REPORT ON UTILITY UNDERGROUNDING PROGRAM
3. PG&E LETTER RE UNDERGROUNDING COST
4. EXPENDITURES RE UNDERGROUNDING COSTS (20A)
5. EXPENDITURES RE UNDERGROUNDING COSTS (20B)
6. COUNCIL POLICY 7-10
7. COUNCIL RESOLUTION 70538
8. COUNCIL RESOLUTION 73357
9. COUNCIL RESOLUTION 73358

51079.00008\6968805.5

SUMMARY

PCIA and NextG claim that the City of San José is delaying wireless and DAS deployments. Both industry commenters are wrong – on the facts and on the law.

San José, which is known as the Capital of Silicon Valley and ranks number 11 on the most recent Forbes list of America's Most Wired Cities, clearly recognizes the importance of broadband and actively promotes wireless deployments. The City Council adopted a wireless policy in 1991 (and continually updates it, most recently in 2003). That policy expressly promotes wireless communications and collocations, and the City has implemented streamlined permitting processes for wireless facilities consistent with that policy. This policy and updates have been accomplished as a result of the City's strong working relationship with many wireless providers. Under the policy and streamlined procedures, most wireless installations and most collocations do not require a "full zoning review and hearing". In fact some antennas do not require any permit whatsoever. Thus, it should be clear that San José should not have been included on PCIA's list of jurisdictions that require a full zoning review and hearing for all collocation applications – and its inclusion raises questions as to how a list with this level of inaccuracy was compiled.

NextG's criticisms of the City's right of way management practices are also misguided. San José, like many California cities, participates in various utility undergrounding programs authorized by the California Public Utilities Commission in 1968. The City has worked cooperatively with utility companies on these programs which are designed to serve the public interest by undergrounding facilities in areas such as streets intensively used by the general public, civic and recreational areas, and areas of unusual scenic interest. In addition to the tens of millions of dollars paid by utility rate payers for this work, the City has expended millions of dollars administering these programs. Thus, NextG's assertion that the City implements

undergrounding programs motivated by a desire to charge monopoly rents to DAS and wireless providers for use of City-owned street lights is obviously wrong. So too are NextG's claims that the City's rental charges for use of its street lights are unlawful and discriminatory. The City treats all comers the same, having adopted a uniform policy for access to its property in 1996 and a standard agreement and a fee schedule in 2001. And no court has found this long-standing fee structure to be illegal under state law – the state statute cited by NextG applies to regulatory permits, not property transactions. Nor is there any basis for finding the fee structure unlawful under Section 253 which does not reach proprietary transactions.

The City supports the comments filed by national associations representing local government interests and urges the Commission to conclude that there are no grounds for Commission action. San José's right of way management and wireless policies are not impeding wireless deployment and it is unnecessary, not in the public interest, and counter-productive for the Commission to replace the City's successful policies and programs with a national one-size-fits-all regime.

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Acceleration of Broadband Deployment)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

REPLY COMMENTS OF THE CITY OF SAN JOSE, CALIFORNIA

The City of San José, California (the “City”) files these reply comments in the above-captioned proceeding. Industry commenters claim that the City is delaying wireless broadband deployment. More specifically, PCIA claims the City is one of several jurisdictions that require a full zoning review and hearing for collocation applications. NextG alleges that the City’s charges to use the right of way for wireless services are an unreasonable barrier to deployment. The allegations are inaccurate – both as to the facts and as to the law. The City has promoted wireless broadband deployment, both within the rights of way and elsewhere in the City. The complaints merely serve as illustrations of the points made in comments filed by national associations¹ urging the Commission to refrain from imposing federal regulation on local right-of-way and zoning processes: namely, there is no significant problem here.

¹ *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association (July 18, 2011) (“National Associations’ Comments”).

I. THE CITY HAS FACILITATED, NOT DELAYED BROADBAND DEPLOYMENT

The City of San José, California (“City”) is a major U.S. city with a long and rich history. It was California's first civilian settlement, founded as Pueblo de San José in 1777, and incorporated as the City of San José in 1850. It was the site of California’s first state capital.

With a population of nearly one million persons, San José is the largest city in the San Francisco Bay Area, the third largest city in California (following Los Angeles and San Diego), and the 10th largest city in the United States. San José is geographically large as well, with a territory of approximately 178 square miles. And it is highly developed industrially, home to the largest concentration of technology expertise in the world--more than 6,600 technology companies employing more than 254,000 people.²

With such a concentration of technology companies located in the area, there is a high demand for superior broadband capabilities. The City simply could not maintain the presence of these companies if it acted as a barrier to broadband deployment. The City’s pro-broadband policies are reflected in the fact that there are numerous wireless and wireline broadband providers in the city and high levels of broadband adoption. The San José/Sunnyvale/Santa Clara area ranked 11th on the most recent Forbes “America’s Most Wired Cities” list.³

Permitting processes are streamlined, and the City has an on-line system which allows citizens and development customers to obtain a variety of information regarding proposed development for properties within the City of San Jose. It also allows registered users to submit

² For more information about the City visit its website, <http://www.sanjoseca.gov/> (last accessed September 30, 2011).

³ The overall ranking was based on these achievements: Broadband adoption: 72%; Number of broadband providers: 12; People per WiFi hotspot: 2,249. See J. Bruner, *Interactive: America’s Most Wired Cities*, Forbes Magazine, <http://www.forbes.com/2010/03/02/broadband-wifi-telecom-technology-cio-network-wiredcities-map.html> (last accessed September 30, 2011).

permit applications, obtain simple development permits and schedule inspections.⁴ Specifically with respect to the deployment of wireless facilities, which is the subject of the criticisms by PCIA and NextG, the City has received over 905 applications since 1993 for wireless telecommunication facilities (including building mounted and free-standing) located on private property. About 10 percent (91) of these applications were later withdrawn by the applicant. Of the remainder, the City approved more than 94 percent (769). The City issued 27 antenna/cell site permits issued in 2008, and 72 antenna/cell site permits issued in 2009 alone.

With respect to applications to install telecommunication facilities in the public-right-of-way, the City has received 381 permit applications since July 1, 2009. About 7 percent (26) of these applications were later withdrawn by the applicant. Of the remainder, the City approved more than 94 percent (336), and the rest (19) are under review by the City. Applications are typically processed very quickly. Where longer time is required, that is typically because the applicant fails to submit complete information, there is a need to do additional community outreach and coordination due to the sensitivity of the proposed project location, or where the applicant is proposing that is novel or involves unique facts, so that impacts need to be studied more closely.

Significantly, the City has achieved these considerable broadband deployments without compromising other important policy goals that make San José a very desirable place to live and work. As discussed further below, this includes a substantial and ongoing utility facilities undergrounding program undertaken pursuant to state law in cooperation with major utilities serving the City. This program is designed to create and maintain residential and commercial areas that are well served by utility services, safe for vehicular and pedestrian traffic, and

⁴ See City of San José On-Line Permits, <http://www.sjpermits.org/permits/>.

aesthetically pleasing. The City has no doubt that the City's residents and businesses have flourished over the decades in large measure as a result of the application of this combination of smart policies that encourage deployment and ensure safe and aesthetically pleasing community development. It would be a travesty if the Commission were to attempt to step in and apply a national one-size-fits-all regime that ignores the local needs and desires of the community and its record of success.

II. PCIA IS WRONG ABOUT THE CITY'S COLLOCATION REVIEW PROCESS

PCIA includes San José on its list of jurisdictions that allegedly require applicants for collocations to go through a full zoning review and hearing and obtain a variance or special use permit for each new collocation on a tower regardless of the status of the existing tower.⁵ Quite simply, this is not correct. In fact, the San José has actively encouraged wireless deployments for the past two decades as demonstrated by City Council Policy 6-20, which expressly promotes wireless communications, and has implemented streamlined permitting processes for installing wireless facilities in the City.⁶

The City's Zoning Ordinance does not include a separate collocation process; rather collocations are encouraged under Policy 6-20. The Policy recognizes that collocations on existing monopoles and utility structures both within and outside the public rights of way can

⁵ *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of PCIA – The Wireless Infrastructure Association and the DAS Forum (A Membership Section Of PCIA) (July 18, 2011) ("PCIA's Comments"), Exhibit B, 7.

⁶ See "Land Use Policy for Wireless Communication Facilities" Council Policy No. 6-20, effective date January 22, 1991; revised date September 16, 2003, attached hereto as Attachment 1. The City's Policy Manual is available online at this link: http://www.sanjoseca.gov/clerk/cp_manual/CPM.asp (last accessed September 30, 2011).

Policy 6-20 is available specifically at this link: http://www.sanjoseca.gov/clerk/cp_manual/CPM_6_20.pdf

reduce the overall visual impacts of wireless installations. Collocations can be approved administratively and require no public hearing. To encourage collocation, entities seeking to erect new, freestanding towers must identify the location of all existing monopoles within a quarter mile of the proposed site, and provide an explanation of why collocation has not been proposed at each site.⁷ Logically, Policy 6-20 also requires antenna installations, including collocated facilities, to conform to the setback and other standards in Policy 6-20 (regarding installations on utility structures in the public rights of way) and to the requirements of the applicable zoning district.⁸

The City's Zoning Ordinance, which is readily available online,⁹ provides streamlined permitting processes and encourages deployment of wireless communications in San José. Some key elements are summarized below:

- Wireless communication antennas¹⁰ that are building mounted may be installed as a matter of right in Residential, Commercial, and Industrial Zones. An administrative approval to ensure that the installment meets zoning and design requirements is all that is required. No public hearing is required. (*See* Code Sections 20.30.100, 20.40.100, and 20.50.100 respectively). There are restrictions on placement of freestanding antennas in designated open space areas (comparable to the National Mall in Washington) – for obvious reasons.

⁷ *Id* at 3.

⁸ *Id*.

⁹ The City's entire Municipal Code is available online, and there is a link to it on the City's homepage (<http://www.sanjoseca.gov/>). Direct access to the City's Municipal Code is available at this link: [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca) (last accessed September 30, 2011).

¹⁰ See Sections 20.200.1410-20.200.1430 for definitions of “wireless communication antenna”.

- Slim line poles proposed for Residential, Commercial, and Industrial Zones require a Special Use Permit which is issued by the Planning Director (or the Planning Commission on Appeal). A full zoning hearing is not required. (*See* Code Sections 20.30.100, 20.40.100, and 20.50.100 respectively, and Part 7 of the Zoning Ordinance starting at Section 20.100.800.)
- Installation of wireless communication antennas in a Residential Zone that do not fit within the above categories – lattice towers being an example – require a Conditional Use Permit (“CUP”). This is essentially the only type of wireless project that requires a discretionary hearing before the Planning Commission or the City Council. (*See* Code Sections 20.30.130, 20.30.140, and 20.100.1300).
- Height limitations for wireless communication antennae may be increased over the height of the zoning district in which it is located. For wireless and building mounted wireless communication the maximum height of a wireless communication antenna may be increased up to 60 feet provided the antenna is a slim line monopole. (*See* Code Sections 20.80.1900 and 20.80.1910 for maximum height exceptions. *See also* Code Sections 20.300.200, 20.40.200, and 20.50.200 for the standard height limitations in the Residential, Commercial, and Industrial Zones respectively.) The height limit in Industrial Zones can extend up to 100 feet per the General Plan height policies.
- Variances/ Development Exceptions to the wireless communication height requirements may be obtained through a request made to the Planning Director (as opposed to a full discretionary hearing before the Planning Commission or the City Council. Also see Part 11, starting with Section 20.100.1300).

In implementing these policies and procedures, the City is also careful to comply with Cal. Gov. Code § 65850.6 with respect to the placement of collocation facilities on wireless telecommunications collocation facilities. Under this state law, a collocation facility is a permitted use, not subject to a discretionary permit in certain circumstances.

It should be apparent from the above summary that PCIA has seriously mischaracterized the City's streamlined collocation review process. It is noteworthy that no individual wireless providers criticized the City's wireless siting or collocation procedures in this proceeding; to the contrary the City's permitting process for placement of wireless facilities in the public rights of way was praised by NextG which stated:

The City of San Jose, California, has a right of way ordinance that similarly provides for a clear path for municipal approval of DAS node attachments. The ordinance treats all equipment equally and does not single out wireless facilities or treat them in a discriminatory fashion. The City's Department of Public Works processes encroachment permits without regard to whether the permit involves installation of wireless facilities. The ordinance does not require a hearing, and the typical processing timeline is 30-60 days for node attachments.¹¹

One can well wonder, then, how PCIA went about compiling its list, and whether it made even a good faith effort to determine whether its accusations were accurate, or was more concerned in creating a lengthy list that it could then use as proof of problems. Giving PCIA the benefit of the doubt – assuming that it was simply passing on a complaint made by one of its members, the list actually points up the following: First, no matter how much effort any community makes to streamline placement, there will always be some complaints. Second, in many cases those complaints will be based on a misunderstanding of wireless policies that could be avoided by

¹¹ *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, MB WC Docket No. 11-59, Comments of NextG Networks, Inc. (July 18, 2011) ("NextG's Comments") at 30, FN 35.

more careful review of applicable codes, and by meeting with local communities. It cannot be relied upon to prove that problems exist in *any community*, and certainly not in San José.

III. NEXTG’S CLAIMS THAT SAN JOSE IS HINDERING WIRELESS AND DAS INSTALLATIONS THROUGH EXCESSIVE CHARGES ARE WRONG AND MISSTATE THE FACTS AND THE APPLICABLE LAW

While, as indicated above, NextG praised the City’s right of way ordinance, it attempts (in the same filing) to convince the Commission that San José and other cities are taking other steps to hinder DAS deployments by “singling out wireless and DAS installations as a revenue source.”¹² NextG takes this view by rewriting (or simply ignoring) the history of undergrounding policies that came into existence decades before the company was formed, and by ascribing nefarious motives to the lawful exercise of cities’ rights as property owners. The tale that NextG weaves is as follows:

- Local ordinances prohibit installation of new poles in designated “underground districts” that require utilities located in the public right of way to be placed underground.
- Companies such as NextG are then “required” to place their facilities on “City-owned light standards” within these underground districts as these streetlights are frequently “the only feasible location to install such facilities.”
- Knowing this, “the cities then demand monopolistic rents.” For example, NextG claims “San José charges \$26,000 a year in rent in order to attach wireless facilities to a streetlight in the public right of way.”
- These rental fees are both:

¹² NextG’s Comments at 15.

- unlawful (“In California, these demands are made despite the fact that California Government Code Section 50030 clearly prohibits cities from charging fees for use of the public rights of way in excess of the city’s actual management costs.”) *and*
- discriminatory (“charges and fees imposed are not imposed on all other occupants of the public rights of way. The cities are singling out wireless and DAS installations as a revenue source.”)

The sweeping conclusion NextG makes (and hopes the Commission will share) is that “cities are using their ‘management’ of the public rights of way to prohibit installation of facilities unless NextG uses the cities’ poles, for which the cities then demand fees that far exceed what it would cost NextG to install its own utility pole and sometimes even exceed the amount of revenue obtained by NextG for the installations.”¹³ The problem with NextG’s story is that it is largely fictitious.

A. San José Has Spent Millions Of Dollars Implementing Its Utilities Undergrounding Program Since 1968 Motivated By A Desire To Improve Its Community, Not To Gain Revenues For Use Of Its Streetlights

NextG’s allegation that San José has used “‘management’ of the public rights of way” to implement a utilities undergrounding program so that the City could charge DAS and wireless providers monopoly rents for use of its street lights is tantamount to arguing the tail is wagging the dog. The City has spent literally millions of dollars over decades to administer and implement its undergrounding programs.¹⁴ The first installation of a wireless facility on a City streetlight did not occur until 1996, and the total cumulative rental fees are a mere pittance in comparison to the City’s decades-long expenditures on the administration of undergrounding.

¹³ *Id.*

¹⁴ See discussion and footnotes *infra*.

For the Commission's (and NextG's) edification, here are some of the pertinent facts about the historical development and expenditures on the City's undergrounding program:¹⁵

- The California Public Utilities Commission (CPUC) and utility companies established a program to underground utilities across the state of California in 1968 (by comparison NextG was formed in 2001).
- The City's utility undergrounding requirements in fact predated the CPUC program (see Municipal Code, Chapter 15.20), but in 1968 the City adopted a new procedures, consistent with the CPUC requirements, to establish underground utility districts (see Municipal Code, Chapter 15.24).
- Under the CPUC process, undergrounding projects are selected after consultation with the utility and after holding a public hearing.
- Projects must be determined to be in the public interest considering a number of criteria (which are summarized in Attachment E to Attachment 2), including, but not limited to:
 - Avoiding or eliminating an unusually heavy concentration of overhead electrical facilities.
 - A street intensively used by the general public and carrying a heavy volume of pedestrian or vehicular traffic.
 - A street passing through a civic area or public recreation area or an area of unusual scenic interest to the general public.

¹⁵ Unless otherwise noted, this summary is drawn from the City's most recent progress report, "Report on the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program" that was presented to the City Council on 04-26-11, attached hereto as Attachment 2. This report is also available online at this link:

http://www.sanjoseca.gov/clerk/Agenda/20110426/20110426_0601.pdf

- A street considered to be an arterial or major collector.
- Projects that front city facilities such as parks, libraries, and fire stations.
- Projects in the downtown core.
- Since 1968, the City of San José has legislated 138 Utility Districts, the vast majority of which (124 projects) have been completed.
- The undergrounding of utility facilities is funded two ways: 1) by PG&E ratepayers thorough a 20A program¹⁶; and (2) from developer in lieu fees authorized by City ordinance and PG&E's Rule 20B program which the City refers to as the "20B program" or "In-Lieu" fee program.¹⁷
- Some of the undergrounding projects are funded by 20A funds only, some by only 20B funds, and some projects are combination projects and are funded from money from the 20A and 20B programs. As of July 1, 2011, PG&E had allocated nearly \$54 million in Rule 20A funds alone to work in San José (through expenditures on closed projects and commitments to further underground conversion adopted prior to July 1).¹⁸
- The City has annually spent hundreds of thousands or more of operating budget dollars out of its General Fund (and more recently fully out of In-Lieu fee funds) to

¹⁶ Any utility other than PG&E which has facilities located in the Utility District is required to underground its facilities when PG&E does, and each bears its own costs.

¹⁷ The City permits developers to either perform the undergrounding conversions where their development is occurring or pay a fee "in lieu" of undergrounding which will be used to perform the conversions at a later date.

¹⁸ See Letter from Pacific Gas & Electric to the City dated August 4, 2011, attached hereto as Attachment 3.

administer the Rule 20A program.¹⁹ The City has also spent hundreds of thousands or more of In-Lieu Fee funds on the administration, design and constructions of Rule 20B projects.²⁰

It should be obvious from the above discussion that the City Council has a strong and longstanding interest in undergrounding above ground utility facilities and poles that by no stretch of the imagination could possibly be considered to be motivated by any desire to gain any rental revenues from wireless or DAS providers. This is a bad-faith allegation by NextG.

Nor is there any possible principle under which NextG could justify a special rule under which it is entitled to place antennae above-ground, while other utilities cannot. NextG seems to believe that California state law permits it to do so, but it does not cite a single court or agency decision that allows it to do so, and certainly cannot ask this Commission to either interpret or extend state law rights. The Commission, of course, has no authority to undo or rewrite undergrounding laws in communities across the country.²¹

B. NextG's Criticisms Of The City's Rental Charges Misstate The Facts And The Law

NextG's allegations concerning the City's pole rental charges are also misleading and inaccurate. NextG claims "San José charges \$26,000 a year in rent in order to attach wireless facilities to a streetlight in the public right of way." NextG also claims these rental fees are unlawful ("In California, these demands are made despite the fact that California Government Code Section 50030 clearly prohibits cities from charging fees for use of the public rights of way

¹⁹ Annual expenditures for administration of Rule 20A programs, totaling nearly \$3.5 million since 2000, are set out in Attachment 4.

²⁰ Annual expenditures for administration, design and construction, utility agreements for Rule 20B programs, totaling nearly \$11 million since 2000, are set out in Attachment 5.

²¹ National Associations' Comments at 64, discussing constitutional limitations on federal authority.

in excess of the city’s actual management costs.”) and discriminatory (“charges and fees imposed are not imposed on all other occupants of the public rights of way. The cities are singling out wireless and DAS installations as a revenue source.”).²² This is wrong on the facts and on the law.

To begin with, the Government Code section cited deals with police power permits that define rules for placement of telecommunication facilities in the rights of way, and not charges for use of poles, lights or other structures – privately or publicly owned – that may be located in the rights of way.²³ A contract for use of that property, which includes the street lights, is not regulatory in any respect – it is simply a property transaction.²⁴

The City’s charges are neither “clearly” illegal, nor discriminatory. To the contrary, the fees are applied consistently to all comers. In 1996, the City established a uniform policy and in 2001 adopted a standard set of fees and agreements for access to its property.²⁵ The City recognized that it might be receiving attachment requests, and rather than negotiate each deal

²² NextG’s Comments at 15.

²³ Cal. Gov. Code §50030. Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is charged and shall not be levied for general revenue purposes.

²⁴ NextG recently made a similar legal argument in *NextG v. Newport Beach*, and the Court declined to exercise supplemental jurisdiction over NextG’s claims under Section 50030 of the California Government Code “because resolution of this claim involves novel issues of California state law that are better left to the state courts.” *NextG Networks of Cal., Inc. v. Newport Beach*, 2011 U.S. Dist. LEXIS 17013 (C.D. Cal. 2011).

²⁵ See “Placement of Communications Facilities on City-Owned Property” Council Policy No. 7-10, effective date October 8, 1996; revised date December 4, 2007, attached hereto as Attachment 6.

Policy 7-10 is available specifically at this link:
http://www.sanjoseca.gov/clerk/cp_manual/CPM_7_10.pdf

individually, it developed a fee schedule based on the size of the antenna and associated facilities, and uniform attachment terms.²⁶ In 2006, the city adopted a multi-site agreement and fee schedule.²⁷ The fees have been in place for years, and nearly every major wireless provider including AT&T, T-Mobile, Sprint, MetroPCS and ClearWire, have entered into agreements to use the City's property under this fee structure. In fact, both AT&T and T-Mobile have current agreements for antenna attachments on City owned light-poles, and pay the standard fees.²⁸ The fee structure was based on the City's own analysis of prices charged for various facilities in the private marketplace.

As indicated above, no court has found the long-standing fee structure illegal under state law, and there is no basis for finding it unlawful under federal law. Indeed, the Commission has no authority under federal law to even review the rates. Section 224 of the Pole Attachment Act of 1978, 47 U.S.C. § 224, defines the Commission's authority over charges for access to poles,

²⁶ See Resolution No. 70538, entitled: "A Resolution Of The Council Of The City Of San José Approving (1) Approving Rates For Attachment Of Telecommunications Equipment On City And Airport Properties (2) Approving Standardized Use Agreements For Placement Of Telecommunications Equipment On City And Airport Property; And (3) Authorizing The City Manager To Execute Such Non-Exclusive Property Use Agreements If They Are Submitted To City Manager For Signature Without Substantive Amendment" dated 7 August 2001, attached hereto as Attachment 7.

²⁷ See Resolution No. 73357, entitled: "A Resolution of the Council of the City of San José Approving a Non-Exclusive Standard Form Agreement for Placement of Telecommunications Equipment on Multiple Sites Owned by the City and Authorizing the City Manager to Execute such Non-Exclusive Property Use Agreement if Submitted for Execution Without Substantive Amendment" adopted August 22, 2006 (http://www.sanjoseca.gov/clerk/Agenda/110607/RESO_73357.PDF) and Resolution No. 73358, entitled: "A Resolution of the Council of the City of San José Approving a Revised Rate Schedule for Placement of Telecommunications Equipment on City Property, to Include Single Site and Multi Site Fees, Annual Fee Increases of 4% or the Annual Increase of the Consumer Price Index, Whichever is Greater and a 20% Discount in Rates for Multiple Sites" adopted 22 August 2006 (http://www.sanjoseca.gov/clerk/Agenda/110607/RESO_73358.PDF). These resolutions are attached as Attachments 8 and 9, respectively.

²⁸ T-Mobile currently has antenna attachments on 18 City lightpoles. and AT&T currently has antenna attachments on two City lightpoles.

conduit and rights of way, and clearly does not authorize the Commission to regulate rates for attachments to municipally-owned property such as the City's streetlights.²⁹ Contrary to NextG's suggestion, Section 253 of the Communications Act, 47 U.S.C. § 253, is a preemptive, not a regulatory provision. It is well-established that federal preemption supersedes only State and local entities' regulatory—not proprietary—actions.³⁰ Likewise, Section 332 of the Act, 47 U.S.C. § 332, does not in any way limit or give the Commission authority to regulate prices charged for access to publicly or privately owned property.

Ultimately, NextG's objection is that it does not want to pay what other providers can and do pay. This does not render the charges "unreasonable" by any standard. The City owns its streetlights, and its interests are like those of any other property owner.³¹ If wireless communications service providers were to decide that the City's rates were too high, they could site their facilities at alternate locations on private property (on or off of the right of way). However, the City's many agreements with providers indicate that its charges are in line with

²⁹ The City does not qualify as a "utility" under 47 U.S.C. § 224.

³⁰ *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that "Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"); *American Airlines, Inc. v. Dep't. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000) ("In determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is."); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993) ("[P]re-emption doctrines apply only to state regulation").

³¹ San José does not mean to imply that it does not have a proprietary interest in its streets, or that the Commission could set a price for use of the City's rights of way. The City certainly charges rents for use of streets by cable operators, for example. However, Cal Pub Util Code § 7901 has been interpreted to limit local authority to charge rents for use of streets for telephone and telegraph lines. It does not reach other types of property. The NextG comments simply underline that the wireless industry is asking the Commission to grant relief it has no authority to grant.

charges for access to similar property. Thus, even if the Commission had authority to interfere with the free market forces at work here (it does not), there is no defensible reason to do so.

One final point concerning NextG's comments is in order. NextG makes broad statements regarding the meaning of various state law provisions; accuses cities of ignoring those laws; and then uses the alleged failure of cities to comply with laws as proof that localities are delaying deployment. But the arguments are disingenuous. NextG simply recites its view of the law, views that have not been adopted by the courts; and then complains because localities are unwilling to accept NextG's legal arguments. NextG can, of course, take whatever legal positions it desires, but it cannot compel localities to accept its view of the law – nor argue that any disagreement it creates over the interpretation of state law is proof of local bad faith or a need for federal rules. The Commission would be well advised to be cautious about NextG's claims. The CPUC previously found that "NextG was not forthright" in discussing its activities with the agency, and ordered an investigation to be undertaken.³² In the subsequent order launching the investigation, CPUC Staff alleged that NextG "made several factual misrepresentations to the Commission."³³ The careless accusations made in this proceeding suggest that the concerns may not be confined to NextG's dealings with the CPUC.

³²See *Application of NextG Networks of California, Inc. (U 6745 C) to expand its existing Certificate of Public Convenience and Necessity [A.02-09-019, D.03-01-061] to include full Facilities-Based Telecommunications Services*, Opinion Granting Request for Expanded Authority and Expedited Environmental Review and Ordering Further Enforcement Proceedings, Decision 07-04-045, April 12, 2007, 11, http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/66738.pdf

³³See *Investigation on the Commission's own Motion into the Operations and Practices of NextG Networks of California, Inc.*, Order Instituting Investigation and Order to Show Cause, I. 08-07-012, July 10, 2008, http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/85262.pdf

IV. THE CITY SUPPORTS THE NATIONAL LOCAL GOVERNMENT ASSOCIATIONS' COMMENTS OPPOSING FEDERAL REGULATION OF LOCAL RIGHTS OF WAY AND WIRELESS SITING

The PCIA and NextG filings illustrate one reason why the City joins the National Associations in opposing federal action – if the misstatements made about the City are representative of the “evidence” being offered by industry to support claims that local governments are a “barrier” to broadband deployment, then there is simply no credible basis for federal action.

The City’s efforts to accommodate new providers and new technologies are designed to meet *local needs and conditions in the city*, it would be inappropriate, unnecessary and potentially disruptive and dangerous for the Commission to substitute rules and models of the Commission’s own making for the ones successfully implemented by the City.

Moreover, the City is concerned that federal regulation in this area may hamper cities from experimenting with different models and approaches to spur broadband deployments. Giving localities broad flexibility to try new arrangements – and to abandon them if they do not work – may be critical to the development of successful deployment and adoption strategies. An inflexible federal rule will stifle local innovation.

Nor is mandatory federal regulation of these local matters what our federal system envisions. Thus, the City strongly supports the National Associations in their call for the Commission to defer in these local deployment matters to the experts – the local governments – and to focus Commission efforts on other areas more appropriate for national policy action.

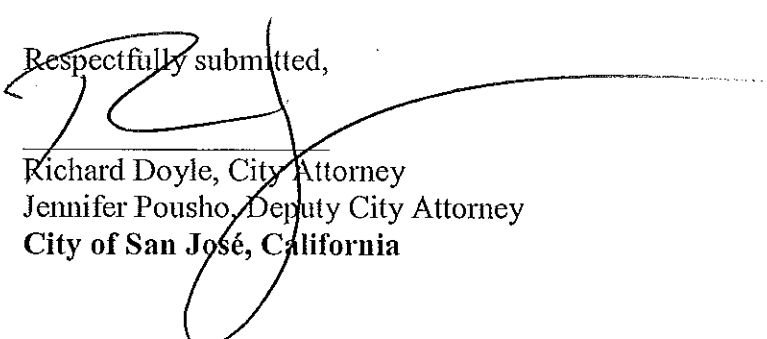
CONCLUSION

The City urges the Commission to conclude that right-of-way and facility management processes and charges are not impeding broadband deployment. There is no evidence that the City’s policies have prevented any company from providing broadband service in San José. In

fact, the City has welcomed and been very responsive to new technologies and new broadband deployments. There are many reasons to believe that federal regulations would prove costly and disruptive to our community, and stifle efforts to develop innovative and flexible processes.

September 30, 2011

Respectfully submitted,



Richard Doyle, City Attorney
Jennifer Pousho, Deputy City Attorney
City of San José, California